BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLIE TUCKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,052,685
AUTOZONE 1640	)	
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the December 13, 2010, preliminary hearing Order For Compensation of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded 6 weeks of temporary total disability compensation (TTD) for the hernia injury suffered on August 17, 2010. The ALJ found that claimant had suffered the accidental injury on the date alleged and that claimant, while failing to provide timely notice, did show just cause for his failure, thus, extending the notice time limit to 75 days.

Claimant appeared by his attorney, Shirla R. McQueen of Liberal, Kansas. Respondent and its insurance carrier appeared by their attorney, D'Ambra M. Howard of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held December 10, 2010, with attachments, and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer accidental injury which arose out of and in the course of his employment with respondent on the date alleged? Respondent contends that claimant suffered from a preexisting injury and a resulting scar from a prior surgery.

The hernia formed on the scar, with a bulge noted 5 to 6 months before this claimed accident. Claimant acknowledges the preexisting scar, but contends that the accident at work aggravated the problem.

2. Did claimant provide timely notice of the alleged accident? Claimant contends that he discussed the matter with his supervisor only a few days after the alleged accident. Respondent contends that claimant's discussions with his supervisor failed to identify a work-related connection to the injury.

3. If claimant failed to provide timely notice of the alleged accident, was there just cause for this failure, sufficient to extend the time for giving notice to 75 days, pursuant to K.S.A. 44-520?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order For Compensation should be reversed.

Claimant began working for respondent on November 6, 2006. On August 17, 2010, claimant was the store manager at respondent's facility in Liberal, Kansas. On that date, claimant was unloading a pallet of freight, with items weighing between 10 and 75 pounds. While working, claimant became nauseous and felt tenderness in his stomach. He assumed that he had suffered a hernia, as he had felt a bulge in the area of a scar received after an earlier gallbladder surgery. Claimant testified that the bulge in the area of the scar had been present for 5 to 6 months before the alleged accident. Claimant continued his shift that day and worked the remainder of the week except for Friday, August 20, when he proceeded to Amarillo, Texas, for a regularly scheduled doctor's visit at the VA Hospital.

Claimant contacted his supervisor, Jamie Thompson (respondent's district manager) by telephone, leaving a voice mail, advising that he was going to be out of the store on a regularly scheduled workday. On the way to Amarillo, claimant was contacted by Mr. Thompson by cell phone. Claimant told Mr. Thompson what had happened,[1] and Mr. Thompson asked claimant if anything needed to be done on workers compensation. Claimant responded that he did not believe so as he had both short-term and long-term disability. Claimant believes that he described the accident while talking with Mr. Thompson.

[1] P.H. Trans. at 10.

When claimant arrived at the VA Hospital in Amarillo, the doctor confirmed that claimant did have a hernia. Surgery was scheduled for September 14, 2010. On September 10, 2010, claimant's employment with respondent was terminated due to claimant having failed another audit. Claimant admitted that he had failed several audits in the past and was warned that another failure would result in his termination. As the result of his termination, claimant lost both the short-term and long-term disability insurance. At some point, claimant called Mr. Thompson and informed him of the upcoming surgery. The surgery was performed at the VA Hospital in Amarillo on September 14, 2010. Claimant was taken off work for 6 weeks as the result of the surgery, after which claimant was released to work with a 10-pound lifting limit for another 6 weeks.

Claimant's deposition was taken approximately two weeks before the preliminary hearing in this matter. The transcript of that deposition was not admitted into evidence in this case. However, claimant was cross-examined at the preliminary hearing based on the information gathered at that deposition. At the deposition, claimant stated that he did not recall if he told his supervisor what may have caused the hernia. Claimant acknowledged at the preliminary hearing that he may not have told his supervisor the cause of his hernia. The hernia developed just above the surgery scar from claimant's gallbladder surgery which took place approximately one to two years before this accident occurred. Then, 5 to 6 months before this accident, claimant began to notice a bulge near the scar. Claimant acknowledged at the preliminary hearing that he was no longer under a doctor's care for the hernia and was having no difficulties post surgery.

Jamie Thompson, respondent's district manager, testified at the preliminary hearing that he was aware that claimant was sick and needed to go home. However, he denied being told that claimant suffered a work-related accident and never asked claimant about filing a workers compensation case.[2] After claimant's termination, claimant did call Mr. Thompson and advise that claimant needed to file a workers compensation claim. This conversation occurred on the date of claimant's termination. Mr. Thompson identified the date of termination as September 10, 2010. Mr. Thompson agreed that, had claimant not been fired, respondent would have been able to meet the 10-pound weight restriction claimant was placed under following being off work for the surgery. When asked if he questioned claimant's need for surgery, Mr. Thompson stated that claimant had undergone several surgeries and he just figured that the most recent one was attributed to something that claimant "had going on".[3]

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[2] Ibid., at 27.

[3] Ibid., at 35.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[7]

Claimant's testimony regarding the mechanics of this alleged injury are uncontradicted in this record. Claimant was unloading pallets of material from a delivery truck when he began feeling nauseous and noticed tenderness in his stomach. Claimant assumed that he had suffered a hernia. Respondent does not dispute claimant's testimony regarding this incident. Respondent simply alleges that the hernia preexisted the incident described by claimant, as claimant had experienced a bulge in the area for 5 to 6 months prior to the date of the alleged injury.

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[4] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

This Board Member finds claimant's description of the incident to be credible. Claimant was unloading a pallet of material when he experienced symptoms.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[8]

However, merely experiencing symptoms does not constitute an accident or an injury under the Kansas Workers Compensation Act (Act).

K.S.A. 2010 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[9]

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[10]

In order for a claimant to qualify for benefits under the Act, he or she must experience both an accident and a resulting injury from that accident. In this instance, claimant suffered an accident as defined in K.S.A. 2010 Supp. 44-508 when he was unloading the pallet of material and experienced nausea and the tenderness in his stomach. The resulting injury would be the hernia claimant was diagnosed with. Therefore, claimant has satisfied the requirements of K.S.A. 2010 Supp. 44-508(d).

Respondent argues that claimant's condition was preexisting and, therefore, not compensable.

However, it is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or

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[8] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[9] K.S.A. 2010 Supp. 44-508(d).

[10] K.S.A. 2010 Supp. 44-508(e).

intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[11]

Regardless of the preexisting condition, if it was aggravated or intensified by the accident, it becomes compensable under the Act.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[12]

K.S.A. 44-520 goes on to say:

> The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .[13]

The ALJ determined that claimant had failed to provide timely notice of this accident. Claimant had initially testified that he contacted Mr. Thompson by telephone on his way to Amarillo to the VA Hospital the weekend after the accident and advised him of the work accident. However, Mr. Thompson testified that during the call, claimant in no way represented that he had suffered a work-related injury. Claimant initially stated that he thought he had mentioned the possibility of a work-related connection. But later, at the preliminary hearing, claimant acknowledged that he was not sure if he mentioned the possibility of a work accident. The ALJ found the first indication that claimant provided notice to respondent occurred on September 10, 2010, the day claimant was fired. This Board Member agrees. Claimant's testimony regarding the contents of the conversation while on his way to Amarillo is uncertain at best. Mr. Thompson, on the other hand, is certain that the alleged conversation regarding a possible workers compensation claim never occurred.

The ALJ determined that claimant had just cause for his failure to timely notify respondent of the accident. The reason given in the ALJ's December 13, 2010, Order For Compensation is identified as "mis-communication". No further explanation was provided. Claimant's accident occurred on August 17, 2010, which was a Tuesday. Claimant testified at the preliminary hearing that he discussed the work-related nature of

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[11] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[12] K.S.A. 44-520.

[13] K.S.A. 44-520.

this incident with Mr. Thompson while claimant was traveling to Amarillo the following weekend. Mr. Thompson refutes that testimony. Claimant then fails to support his own testimony. This Board Member fails to understand the "mis-communication" which allegedly occurred in this instance. Claimant failed to satisfy his burden of proving timely notice, yet argues that this failure is a "mis-communication" justifying the extension of the notice time limit to 75 days.

Claimant was aware that he suffered immediate symptoms while performing heavy lifting at work, yet he failed to timely notify respondent of the accident. There is no just cause in this record to support that failure. Claimant did not testify that he was uncertain whether the lifting had caused the problem. He testified that he assumed that he had suffered a hernia.[14] He then proceeded to the VA Hospital in Amarillo, where his assumptions were verified. All of this occurred within days of the accident, yet claimant allowed the VA to provide and pay for the surgery, and claimant continued working without further comment to respondent up to the date of his termination. Just cause for claimant's failure to timely notify respondent of this accident is not contained in this record. The finding by the ALJ of just cause is reversed. The award of TTD is, therefore, also reversed and claimant is denied benefits for the injury suffered on August 17, 2010.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving that he suffered personal injury by accident on August 17, 2010, which arose out of and in the course of his employment. However, claimant has failed to prove that he provided timely notice of the accident and there was not just cause proven in this record sufficient to allow the notice time limit to be expanded to 75 days. Therefore, the award of TTD by the ALJ is reversed and benefits are denied claimant for the accident on August 17, 2010.

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[14] P.H. Trans. at 6.

[15] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Pamela J. Fuller dated December 13, 2010, should be, and is hereby, reversed and benefits to claimant are denied.

IT IS SO ORDERED.

Dated this ____ day of February, 2011.

HONORABLE GARY M. KORTE

c: Shirla R. McQueen, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge